UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 60

Docket No. DA-1221-11-0365-W-1

Donald W. Cassidy,

Appellant,

v.

Department of Justice,

Agency.

April 25, 2012

Donald W. Cassidy, The Woodlands, Texas, pro se.

Jeff Rosenblum, Esquire, and Matthew Edward Bradley, Falls Church, Virginia, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we REVERSE the initial decision and REMAND this appeal to the Dallas Regional Office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 The appellant is a GS-15 Deputy Chief Counsel for the Department of Homeland Security, Immigration and Customs Enforcement (ICE) in Houston,

Texas. Initial Appeal File (IAF), Tab 1 at 1, Tab 5 at 25. He applied for two Immigration Judge positions with the Department of Justice's Executive Office for Immigration Review, one in San Antonio and the other in Houston. IAF, Tab 1 at 4. He was not selected for either position, and he filed an IRA appeal alleging that his nonselection was in retaliation for complaints he made to the Assistant Chief Immigration Judge concerning the conduct of another immigration judge under his supervision. *Id.* at 3-4, 6-7.

¶3 The administrative judge gave the appellant notice of the requirements for establishing jurisdiction over his IRA appeal and an opportunity to address those requirements. IAF, Tab 3. She found that the appellant demonstrated that he exhausted his administrative remedies with the Office of Special Counsel (OSC) with respect to his five disclosures and two nonselections, but she dismissed the appeal for lack of jurisdiction based on her finding that he failed to make a nonfrivolous allegation of a protected disclosure. IAF, Tab 22, Initial Decision (ID) at 12-14. The appellant has filed a petition for review challenging the administrative judge's findings, and the agency has filed a substantive opposition. Petition for Review (PFR) File, Tabs 1, 3.

ANALYSIS

¶4 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before OSC and makes nonfrivolous allegations that: (1) He engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001). To meet the nonfrivolous standard, an appellant need only plead allegations of fact that, if proven, could show that he made a protected disclosure and that the disclosure was a contributing factor in a personnel action. *See Weed v. Social Security Administration*, 113 M.S.P.R. 221, ¶ 18 (2010). Any doubt or ambiguity as to

whether the appellant made nonfrivolous jurisdictional allegations should be resolved in favor of finding jurisdiction. *Ingram v. Department of the Army*, 114 M.S.P.R. 43, ¶ 10 (2010). If the appellant establishes Board jurisdiction over his IRA appeal by exhausting his remedies before OSC and making the requisite nonfrivolous allegations, he has the right to a hearing on the merits of his claim. *See Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 7 (2011).

Exhaustion

¶5 An employee seeking corrective action for whistleblower reprisal under 5 U.S.C. § 1221 is required to seek corrective action from OSC before seeking corrective action from the Board. 5 U.S.C. § 1214(a)(3); *see Baldwin v. Department of Veterans Affairs*, 113 M.S.P.R. 469, ¶ 8 (2010). The Board may only consider those disclosures of information and personnel actions that the appellant raised before OSC. *See Baldwin*, 113 M.S.P.R. 469, ¶ 8. To satisfy the exhaustion requirement, the appellant must inform OSC of the precise ground of his charge of whistleblowing, giving OSC a sufficient basis to pursue an investigation that might lead to corrective action. *Kukoyi v. Department of Veterans Affairs*, 111 M.S.P.R. 404, ¶ 13 (2009).

¶6 As the administrative judge correctly found, the appellant established that he exhausted his administrative remedies with respect to disclosures that he made to Assistant Chief Immigration Judge Larry Dean concerning the conduct of another immigration judge, Howard Rose. IAF, Tab 5 at 22-43; ID at 6-12. In his OSC complaint, the appellant asserted that he made complaints to Judge Dean about: (1) Judge Rose's failure to start immigration proceedings on time; (2) Judge Rose's ineffective procedures on the bench; (3) the loss of government attorney time waiting for Judge Rose; (4) the resulting costs to the government of detaining individuals in immigration custody due to Judge Rose's delays; and (5) violations of the due process rights of detained aliens who did not have an initial appearance before Judge Rose within 48 hours, as required by a settlement agreement. IAF, Tab 5 at 26. The appellant asserted that these disclosures

influenced his nonselection for two immigration judge positions. *Id.*; *see* 5 U.S.C. § 2302(a)(2)(A)(i), (b)(8) (prohibiting an employee from taking, or failing to take, a personnel action, such as an appointment, because of a protected disclosure). In subsequent communications to OSC, the appellant emphasized his belief that an alien's 30-, 60-, or 90-day detention prior to seeing any judge or magistrate is a violation of constitutional due process rights. IAF, Tab 5 at 34. On February 7, 2011, OSC notified the appellant that it terminated its inquiry into these allegations and informed him of his right to seek corrective action from the Board, and the appellant timely filed an IRA appeal. *Id.* at 39; IAF, Tab 1. Thus, we find that the appellant exhausted his remedies with respect to the five disclosures and his nonselection for the San Antonio and Houston immigration judge positions.

Disclosures

¶7 Protected whistleblowing occurs when an appellant makes a disclosure that he reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. *See* 5 U.S.C. § 2302(b)(8); *Mason*, 116 M.S.P.R. 135, ¶ 17; 5 C.F.R. § 1209.4(b). At the jurisdictional stage, the appellant is only burdened with nonfrivolously alleging that he reasonably believed that his disclosure evidenced a violation of one of the circumstances described in 5 U.S.C. § 2302(b)(8). *Mason*, 116 M.S.P.R. 135, ¶ 17. The proper test for determining whether an employee had a reasonable belief that his disclosures were protected is whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions evidenced a violation of a law, rule, or regulation, or one of the other conditions set forth in 5 U.S.C. § 2302(b)(8). *Id.*

¶8 We agree with the administrative judge's conclusion that the appellant's first four disclosures do not fall within one of the categories of protected whistleblowing. His complaints that Judge Rose was late, ineffective and

inefficient on the bench, caused a loss of government time, and caused a loss of government money are insufficient to constitute nonfrivolous allegations of gross mismanagement or a gross waste of funds. "Gross mismanagement" is more than de minimis wrongdoing or negligence; it means a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. *See Swanson v. General Services Administration*, 110 M.S.P.R. 278, ¶ 11 (2008). Although the appellant's allegations arguably concern unnecessary delays by Judge Rose and slower processing of cases, the appellant has not nonfrivolously alleged that a disinterested observer could reasonably conclude that any mismanagement of Judge Rose's docket was "gross," i.e., that it created a "substantial risk" of "significant" adverse impact upon the agency's ability to accomplish its mission. *See Lane v. Department of Homeland Security*, 115 M.S.P.R. 342, ¶ 19 (2010). Furthermore, we find that the appellant has not made nonfrivolous allegations that a disinterested observer could reasonably conclude that Judge Rose's delays resulted in a gross waste of funds. *See id.*, ¶ 31 ("[E]stablishing a reasonable belief that one is disclosing a gross waste of funds is a substantial hurdle, as gross waste of funds constitutes a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government.").

¶9 We find, however, that the appellant did make a nonfrivolous allegation that his fifth disclosure was protected. The appellant complained to Judge Dean that Judge Rose's conduct and unnecessary delays violated the due process rights of detained aliens. IAF, Tab 5 at 26. In particular, he argued that Judge Rose caused up to 90-day delays for detained aliens scheduled for their initial appearances before him. *Id.* The appellant explained that immigration judges schedule master calendar hearings whereby they process up to 30 cases at a time. *Id.* at 25-26. During the master calendar hearings, the judge may continue a case to allow time for the alien to find an attorney, may schedule a hearing, or may grant an alien's request for an order of removal. *Id.* The appellant argued that

Judge Rose often did not complete his master calendar docket, which resulted in some aliens unnecessarily remaining in detention for 90 days. *Id.* at 26. He also argued that such unnecessarily lengthy detention was "unfair, unreasonable, a violation of rights and a huge waste of government money." *Id.* Furthermore, the appellant alleged that this delay violated a settlement agreement whereby the Department of Justice agreed that every alien within the jurisdiction of the Houston immigration court would have an initial hearing with an immigration judge within 48 hours of notice of the detention. *Id.*; IAF, Tab 8 at 7.

¶10 We find that the appellant made a nonfrivolous allegation that he reasonably believed that he was disclosing a violation of law, rule, or regulation in his communications with Judge Dean. As the Deputy Chief of the Houston ICE office, the appellant had personal knowledge of the delays between the time an alien was initially placed in immigration detention and his initial appearance before Judge Rose. IAF, Tab 8 at 5-7. He clearly expressed his belief that such a delay was in violation of constitutional due process rights. *Id.* Although the administrative judge faulted the appellant for not providing a bright line rule concerning the due process rights of detained aliens, this issue is unclear and has been the subject of extensive federal court litigation. ID at 13-14; PFR File, Tab 1 at 10-11; *see White v. Department of the Air Force*, 391 F.3d 1377, 1382 n.2 (Fed. Cir. 2004) (in determining whether an individual had a reasonable belief that a violation of law, rule, or regulation occurred, the existence of an actual violation may be debatable); *Swinford v. Department of Transportation*, 107 M.S.P.R. 433, ¶ 8 (2007). Thus, we find that the appellant made a nonfrivolous allegation of a reasonable belief that Judge Rose's actions violated constitutional due process rights.[1] *See Mason*, 116 M.S.P.R. 135, ¶ 17 ("The appellant is not

[1] Although the appellant made vague references to international law, we find that such allegations do not constitute a reasonable belief of a violation of law, rule, or regulation because he did not clearly implicate an identifiable law or principle of law. IAF, Tab 8 at 6; *cf. Mason*, 116 M.S.P.R. 135, ¶ 17.

required to identify the particular statutory or regulatory provision that the agency allegedly violated when his statements and circumstances of those statements clearly implicate an identifiable law, rule, or regulation. Rather, at the jurisdictional stage, he is only burdened with nonfrivolously alleging that he reasonably believed that his disclosure evidenced a violation of one of the circumstances described in 5 U.S.C. § 2302(b)(8).”); *Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶¶ 6-7 (2006) (there is no de minimus exception for the violation of any law, rule, or regulation aspect of the Whistleblower Protection Act’s protected disclosure standard). Furthermore, we find that the appellant’s allegations that the delays not only deprived detained aliens of due process rights, but also violated a class action settlement agreement that required an alien’s initial appearance before an immigration judge within 48 hours is a nonfrivolous allegation of a violation of law, rule, or regulation.[2] IAF, Tab 5 at 26, Tab 8 at 7; PFR File, Tab 1 at 8. Thus, on remand, the administrative judge shall allow argument and evidence on both the alleged constitutional issues and settlement agreement violations.

¶11 The agency argues, and the appellant disputes, that the appellant’s alleged disclosures were not protected because they were known to Judge Dean and they were within the normal course of his duties. PFR File, Tab 3 at 15-16; IAF, Tab 15 at 7-10. It is unclear whether the specific issues that the appellant complained about were known to Judge Dean. Further, contrary to the agency’s assertion, the record does not indicate whether the appellant’s complaints to Judge Dean, an immigration judge in a different federal agency, were within the normal course of

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[2] The appellant objects to the administrative judge’s finding that he could not demonstrate that Judge Rose violated the terms of the settlement agreement applicable to the aliens detained in Livingston, Texas because the settlement agreement was only applicable to aliens detained in Houston, Texas. PFR File, Tab 1 at 8; ID at 12. Indeed, there is no evidence on this issue in the record, and it was improper for the administrative judge to make a factual finding on this issue at this stage in the proceedings. *See Ingram*, 114 M.S.P.R. 43, ¶ 10.

his duties in his position as an ICE Deputy Chief or whether any obligation the appellant had to report such complaints precludes them from constituting protected disclosures. *See Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1352-55 (Fed. Cir. 2001); *Tullis v. Department of the Navy*, 117 M.S.P.R. 236, ¶¶ 10-11 (2012). In any event, it is improper to weigh evidence and resolve conflicting assertions of the parties at the jurisdictional stage. *See Ingram*, 114 M.S.P.R. 43, ¶ 10. After further development of the record on remand, the administrative judge shall weigh the evidence and make findings of fact on these issues.

Contributing Factor

¶12 To satisfy the contributing factor criterion, an appellant need only raise a nonfrivolous allegation that the fact of, or content of, the protected disclosure was one factor that tended to affect the personnel action in any way. *Mason*, 116 M.S.P.R. 135, ¶ 26. One way to establish this criterion is the knowledge-timing test, under which an employee may nonfrivolously allege that the disclosure was a contributing factor in a personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1); *Baldwin*, 113 M.S.P.R. 469, ¶ 22. Once the appellant has made a nonfrivolous allegation that the knowledge-timing test has been met, he has met his jurisdictional burden with regard to contributing factor. *See Tullis*, 117 M.S.P.R. 236, ¶ 12.

¶13 The appellant alleges that he complained to Judge Dean about Judge Rose's behavior prior to his nonselection for the two immigration judge positions.[3]

[3] The initial decision suggests that the appellant alleges that he made his protected disclosures in November 2010. ID at 12. It is clear, however, that November 2010 is when he filed his complaint with OSC, and the appellant clearly stated below that he made the disclosures to Judge Dean prior to his nonselection for both positions. IAF,

Although he did not make specific allegations below about when he made these disclosures, it appears that he sent e-mails to Judge Dean in October 2009 complaining about the "indeterminate detention" of aliens due to the processing delays. PFR File, Tab 1 at 9, 13.[4] It is undisputed that the appellant was ranked first for the San Antonio position after his interview and reference checks, which were conducted on or before January 5, 2010. IAF, Tab 14 at 2, Subtab 4cc. In addition to checking the appellant's references, Judge Dean also chose to interview Judge Rose and others regarding the appellant's suitability for the position. IAF, Tab 8 at 21, Tab 14, Subtabb 4dd at 6. During Judge Dean's interview with Judge Rose regarding the appellant, which occurred on or before January 6, 2010, Judge Rose "indicated that the applicant is not a good people person nor does he have a good temperament . . . that the applicant 'lords' over people and that 'lots of good people' have left the [Chief Counsel's] office because of the applicant . . . [and] that the applicant is not easy to get along with, and he suspects that he would be a 'screamer' in court." IAF, Tab 14, Subtab 4dd at 6. Judge Dean forwarded this assessment to the selection panel, which decided

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Tab 5 at 22, 26 ("After filing these complaints, Judge Dean was an interviewer on the panels for my immigration judge interviews for both San Antonio and Houston.").

[4] The appellant has not demonstrated that the new documents he submits on review were unavailable to him prior to the close of record below. PFR File, Tab 1 at 5-6. It also appears, however, that the appellant, who is pro se, believed that he would be able to carry on with discovery and present his evidence at a hearing, and, indeed, the record reflects that there were outstanding motions to compel discovery that the administrative judge had not resolved prior to issuing the initial decision dismissing for lack of jurisdiction. *Id.*; IAF, Tabs 16, 18. Further, in her second order to show cause, the administrative judge ordered the appellant to submit evidence regarding whether he participated in a grievance proceeding and informed him that if he failed to submit such evidence, his appeal would be dismissed for lack of jurisdiction. IAF, Tab 20. He responded to the administrative judge's second show cause order, and it appears that he believed, based on this order, that the matter of the grievance was the only outstanding jurisdictional issue. IAF, Tab 21; PFR File, Tab 1 at 6. Thus, we have considered the new evidence regarding the dates of his disclosures to the extent that they affect the jurisdictional question with respect to the knowledge-timing test. *See, e.g.*, *Atkinson v. Department of State*, 107 M.S.P.R. 136, ¶ 12 (2007).

on January 20, 2010, to remove the appellant from the first-ranked position based on the comments Judge Dean solicited in the additional interviews. IAF, Tab 14, Subtabs 4bb, 4cc, 4dd; IAF, Tab 8 at 21-22. The appellant alleges that Judge Dean's decisions to conduct additional interviews of individuals presumably hostile to the appellant and to forward adverse information to the selection panel were retaliatory. IAF, Tab 8 at 8-10.

¶14 Although Judge Dean did not make the ultimate decision regarding the appellant's nonselection for the San Antonio position, we find that the appellant made a nonfrivolous allegation that Judge Dean influenced the selection panelists, Acting Director Thomas Snow and Chief Immigration Judge Brian O'Leary, because they ultimately concluded that the appellant was not their first choice as a candidate for the immigration judge position based upon the remarks that Judge Dean solicited from Judge Rose and others. IAF, Tab 8 at 22, Tab 14, Subtab 4a at 4; *see McCarthy v. International Boundary & Water Commission*, 116 M.S.P.R. 594, ¶ 12 (2011) (an appellant may establish imputed or constructive knowledge of his disclosures by demonstrating that an individual with actual knowledge of the disclosure influenced the officials accused of taking the retaliatory action); *Marchese v. Department of the Navy*, 65 M.S.P.R. 104, 108-10 (1994). Thus, under the knowledge-timing test, the appellant has made a nonfrivolous allegation that the alleged protected disclosure was a contributing factor in his nonselection for the San Antonio position.[5] The appellant also submitted evidence revealing that Judge Dean considered him to have "disparaged" Judge Rose. IAF, Tab 8 at 17. Additionally, when conducting the appellant's reference check, Judge Dean asked the appellant's supervisor whether he thought that the appellant would get into a fight with Judge Rose on "the first day or the second day in the office." *Id.* We find that the appellant

[5] The appellant was notified in May 2010 that he was not selected for the San Antonio position. IAF, Tab 14, Subtab 4p.

nonfrivolously alleged that these comments by Judge Dean constitute additional circumstantial evidence that Judge Dean's vetting process and conveying of negative information about the appellant to the selection panel was tainted by retaliatory motive. *See Fellhoelter v. Department of Agriculture*, 568 F.3d 965, 971 (Fed. Cir. 2009) (evidence of retaliatory motive may be relevant to demonstrating a prima facie case of reprisal for whistleblowing).

¶15 The appellant also alleged that his nonselection for the Houston position was similarly tainted by "the adverse material provided by Judge Dean." IAF, Tab 15 at 7. Mr. Snow, who declined to select the appellant for the San Antonio position, was also on the selection panel for the Houston position. The appellant was again ranked first for the Houston position prior to his interview. IAF, Tab 14, Subtab 4v at 1, 8. The appellant alleged that he was significantly more qualified than the other applicants, and that Mr. Snow had no choice but to rank him as first. IAF, Tab 8 at 10. He also alleged that he did not have a fair chance at the interview, that Mr. Snow treated him in a dismissive manner, and that the interview was the agency's opportunity to come up with a reason to not select him. *Id.* Indeed, based on the appellant's allegations, the additional interviews conducted by Judge Dean of immigration judges and staff in Houston, which resulted in negative information about the appellant, may have influenced Mr. Snow's consideration of the appellant for the Houston position. Furthermore, the appellant applied for the Houston position in December 2009, shortly after his October 2009 complaint to Judge Dean, his interview took place in May 2010, and he was informed that he was not selected for the position in June 2010. IAF, Tab 14, Subtabs 4n, 4t, 4ff at 1. Thus, the time between the appellant's disclosure and his nonselection was approximately 8 months. This is sufficiently close in time to satisfy the knowledge-timing test. *See Gonzalez v. Department of Transportation*, 109 M.S.P.R. 250, ¶ 20 (2008) (finding that a time period of slightly over 1 year satisfied the knowledge-timing test). Thus, the appellant has

made a nonfrivolous allegation that his protected disclosures were a contributing factor in his nonselection for the Houston position.

¶16 The administrative judge quoted extensively from OSC's letters to the appellant detailing the reasons for its termination of the investigation. OSC's written statement containing its summary of relevant facts and its reasons for terminating the investigation "may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement." 5 U.S.C. § 1214(a)(2)(B); *Bloom v. Department of the Army*, 101 M.S.P.R. 79, ¶ 10 (2006). It does not appear that the administrative judge explicitly advised the appellant that the OSC letters referred to in 5 U.S.C. § 1214(a)(2)(B) were inadmissible without the appellant's consent. *See Bloom*, 101 M.S.P.R. 79, ¶ 10. An IRA appeal is a de novo action, and the Board must rely on its independent analysis of the parties' evidence, not on OSC's characterizations of the appellant's allegations. *Id.* Thus, on remand, the administrative judge may not rely upon OSC's decision or its characterization of the appellant's allegations to make findings on the merits of his IRA appeal. *Id.*; *see Smith v. Department of Agriculture*, 64 M.S.P.R. 46, 55 (1994).

ORDER

¶17 Based on the foregoing, we REMAND the appeal to the Dallas Regional Office for further adjudication consistent with this Opinion and Order. The administrative judge shall hold a hearing and adjudicate the merits of the appellant's IRA appeal.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.